In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-557

STATE OF NEW MEXICO, PETITIONER

v.

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner contends that the Social Security Administration erred in assessing contributions to be made by a public employer pursuant to an agreement with the Secretary of Health, Education, and Welfare under 42 U.S.C. 418(a)(1).

States and political subdivisions such as the University of New Mexico and their employees are not automatically covered by the Social Security Act, 49 Stat. 620, as amended, 42 U.S.C. 301 *et seq.*, and, as a corollary, are not subject to the Federal Insurance Contributions Act (FICA), as amended, 26 U.S.C. 3101 *et seq.* They may, however, enter into an agreement with the Secretary of Health, Education, and Welfare to extend Social Security coverage to their employees, and to make contributions to the United States in lieu of FICA taxes. 42 U.S.C. 418. Since 1955, employees of the University of New Mexico have been covered by such a "Section 418" agreement (Pet. App. 1a-2a).

In 1968, pursuant to its general plan for determining payments to be made to employees during their absence from work because of sickness, the University paid an employee, L. H. Galloway, his regular straight-time rate of pay during such an absence. Payments were made from a regular salary account rather than from a special sick leave account. State law did not authorize the University to make payments to employees solely on account of sickness (Pet. App. 2a).

The University did not make a contribution with respect to the payments to Galloway. The Commissioner of Social Security determined that a contribution should have been made, and he assessed a deficiency of $28.60 (Pet. App. 2a). After exhausting its administrative remedies, petitioner brought this action in the United States District Court for the District of New Mexico, contesting the Commissioner's determination. The district court granted the Secretary's motion for summary judgment, and the court of appeals affirmed (Pet. App. 1a-8a).

1. A public employer who enters into an agreement with the Secretary pursuant to 42 U.S.C. 418 must pay to the federal government "amounts equivalent to the sum of the taxes which would be imposed * * * if the services of employees covered by the agreement constituted employment [for FICA purposes] * * *." 42 U.S.C. 418(e)(1)(A). The FICA taxes arising from "employment" are imposed upon "wages." 26 U.S.C. 3101 and 3111. For FICA purposes, "wages" is defined so as to exclude "the amount of any payment * * * made to, or on behalf of, an employee or any of his dependents under a plan or system established by an employer which makes provision for his employees generally * * *, on account of * * * (B) sickness or accident disability * * *." 26 U.S.C. 3121(a)(2).

Thus the University's payments to Galloway were "wages" subject to contribution unless they were made "on account of * * * sickness." The Commissioner, following established practice (see S.S.R. 72-56), determined

that since New Mexico law does not authorize payments to be made to state employees or to employees of state institutions, such as the University, solely "on account of * * * sickness," the payments to Galloway could not be deemed to be such payments. If, on the other hand, the payments to Galloway had been made not from the regular salary accounts but from a segregated sick leave account, pursuant to statutory authorization to make payments "on account of * * * sickness," those payments would not have been treated as "wages" and no corresponding contribution would have been required (*ibid.*).

2. Petitioner contests this result on the ground that salary continuation payments made by a private employer pursuant to a sick leave plan are excluded from "wages" for purposes of computing FICA taxes. See Rev. Rul. 65-275, 1965-2 Cum. Bull. 385. Petitioner challenges the Secretary's authority to promulgate regulations providing for different treatment of public employees. But the statute requires a State entering into a Section 418 agreement to "comply with such regulations relating to payments * * * as the Secretary * * * may prescribe * * *." 42 U.S.C. 418(e)(1)(B). In turn, the Secretary is empowered to promulgate regulations that will impose upon public employers "the same [obligations], *so far as practicable*, as those imposed on [private] employers * * *." 42 U.S.C. 418(i) (emphasis added). The court of appeals correctly sustained the Secretary's determination that it was not practicable to treat public employers' salary continuation payments in the same manner as those made by private employers.

The circumstances of a private employer differ from those of the public employer in that the former may make donations to employees during periods of absence without restriction, whereas payments made by the latter are governed by statutes that frequently bar donations as such.

If the governing statute does not authorize payments solely "on account of * * * sickness," but instead simply permits absence on account of sickness to be excused, the public employer lacks authority to make non-wage contributions. As the court of appeals correctly observed (Pet. App. 7a-8a):

> Such a consideration would not be of concern in the administration by the IRS of the provisions taxing private employers; hence the need for different treatment of sick leave payments in respect to public employers, i.e., the additional requirement imposed upon the States that such authorization in fact exists.

Where the public employer lacks authority to make non-wage contributions, salary continuation payments are properly considered "wages" for purposes of the determination of liability under a Section 418 agreement. This is the longstanding administrative construction of the States' obligations under such agreements and as such it is, of course, entitled to great weight. *Udall* v. *Tallman*, 380 U.S. 1. This construction conforms to the congressional intent that doubts be resolved in favor of coverage. S. Rep. No. 1669, 81st Cong., 2d Sess., p. 2 (1950). Moreover, petitioner's own Attorney General has concluded that petitioner and its instrumentalities have no authority to make non-wage contributions and that salary continuation payments must be treated as wages for Social Security purposes. Op. Atty Gen. N. Mex., No. 71-21 (February 15, 1971).

3. Finally, contrary to petitioner's contention (Pet. 7-8), the decision below casts no doubt on petitioner's authority to continue its Section 418 agreements. The validity of those agreements has not been questioned. Furthermore, petitioner's legislature could empower petitioner to make non-wage contributions "on account of

* * * sickness," and such payments would not give rise to liability under petitioner's Section 418 agreements.

The decision below is not in conflict with that of any other court of appeals and does not warrant review. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.

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